(7) (5) (5)

Nos. 87-821, 87-827, and 87-1095

In the Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND EIGHTH CIRCUITS

BRIEF FOR THE FEDERAL PETITIONERS

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

59pp

QUESTIONS PRESENTED

1. Whether Section 402(f)(2) of the Black Lung Benefits Act, which provides that the "criteria" applied to certain claims adjudicated by the Secretary of Labor "shall not be more restrictive" than the criteria applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, requires that, in addition to applying medical criteria no more restrictive than HEW's, the Department of Labor also must apply evidentiary rules and adjudicatory standards no more restrictive than HEW's.

2. Whether the Eighth Circuit erred in holding that a writ of mandamus should issue directing the Secretary of Labor to reopen thousands of claims for black lung benefits that had been finally denied before that court concluded that the Secretary had erroneously construed Section 402(f)(2).

PARTIES TO THE PROCEEDING

In addition to James Sebben (whose actual name, Seddon, has been misspelled throughout this litigation), John Cossolotto, Bruno Lenzini, and Charles Tonelli, on behalf of themselves and all others similarly situated, brought suit in the United States District Court for the Southern District of Iowa; they are respondents in both No. 87-821 and No. 87-827. They named as defendants the Secretary of Labor (currently Ann McLaughlin, who replaced Dennis E. Whitfield, the Deputy Secretary of Labor, and William E. Brock, III, the former Secretary of Labor), the Department of Labor, and Steven Breeskin, Deputy Commissioner of the Department's Division of Coal Mine Workers' Compensation; the defendants are petitioners in No. 87-827. Pittston Coal Group, Barnes & Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company, and Pennsylvania National Insurance Group intervened in the Eighth Circuit; they are petitioners in No. 87-821.

In addition to the petitioner, the Director of the Department of Labor's Office of Workers' Compensation Programs, and respondent Charlie Broyles, Lisa Kay Colley is a respondent in No. 87-1095.

TABLE OF CONTENTS

Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations and rule:

Statutes, regulations, and rule—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-821

PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

No. 87-827

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

No. 87-1095

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND EIGHTH CIRCUITS

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the Eighth Circuit in *Sebben* (87-827 Pet. App. 1a-18a) is reported at 815 F.2d 475. The opinion

of the United States District Court for the Southern District of Iowa (87-827 Pet. App. 19a-22a) is unreported.

The opinion of the Fourth Circuit in *Broyles* (87-1095 Pet. App. 1a-6a) is reported at 824 F.2d 327. The decisions of the Benefits Review Board (87-1095 Pet. App. 7a-9a (*Broyles*) and 18a-21a (*Colley*)) are unreported, as are the decisions of the administrative law judges (87-1095 Pet. App. 10a-17a (*Broyles*) and 22a-28a (*Colley*)).

JURISDICTION

The judgment of the Eighth Circuit in *Sebben* was entered on March 25, 1987. The order denying the Secretary's petition for rehearing was entered on June 25, 1987 (87-827 Pet. App. 23a). The order denying the intervenors' petition for rehearing was entered on July 24, 1987 (87-821 Pet. App. 18a). On September 17, 1987, Justice Blackmun extended the time for filing petitions for a writ of certiorari to and including November 20, 1987. Both the Secretary's and the intervenors' petitions were filed on that date. This Court granted the petitions and consolidated them on February 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the Fourth Circuit in *Broyles* was entered on July 31, 1987. A petition for rehearing was denied on September 30, 1987 (87-1095 Pet. App. 29a-30a). The petition for a writ of certiorari was filed on December 29, 1987. The Court granted the petition and consolidated it with Nos. 87-821 and 87-827 on April 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), HEW's "interim" regulation, 20 C.F.R. 410.490, and Labor's "interim" regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief (App., *infra*, 1a-8a).

STATEMENT

1. *Statutory and regulatory framework.* Under the Black Lung Benefits Act,[1] 30 U.S.C. (& Supp. III) 901 *et seq.*, "[d]isability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs,* No. 86-327 (Dec. 14, 1987), slip op. 5.[2] Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973,

---

[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, was amended by and became known as the Black Lung Benefits Act in 1972. See Pub. L. No. 92-303, 86 Stat. 150, 30 U.S.C. (& Supp. III) 901 *et seq.* It subsequently was amended by the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a) and (d), 100 Stat. 312, 313.

[2] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal mine dust and asbestos. See Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal mine dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 410.401(b), 727.202, 718.201) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct, as did this Court in *Mullins Coal Co.*

under Part B of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid from the general revenues of the United States. 30 U.S.C. 922(a), 924. Claims filed after that date, and adjudicated under Part C of the Act, are considered by the Department of Labor (30 U.S.C. 902(c)) and individual coal mine operators bear primary responsibility for paying benefits (30 U.S.C. 932(b)).[3]

a. *HEW's regulations.* From its 1969 enactment until its 1978 amendment, the Black Lung Benefits Act provided that "the term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare." See 30 U.S.C. (1976 ed.) 902(f). After HEW defined "total disability" as the inability to engage in any substantial gainful activity (see 20 C.F.R. 410.402(b) (1971)), Congress in 1972 provided that a miner should be considered totally disabled whenever he is unable to perform work comparable to his usual coal mine work. 30 U.S.C. 902(f)(1)(A). Congress at that time also liberalized the coverage of the program in several other respects.[4] HEW thereafter promulgated an amended set of regulations, known as its "permanent" regulations, which

[3] In certain cases, the Black Lung Disability Trust Fund, which the coal mining industry finances through an excise tax on coal and the Director of the Office of Workers' Compensation Programs administers, pays Part C benefits. See 30 U.S.C. 932(j), 934; 26 U.S.C. 4121(a), 9501.

[4] Among other changes, Congress directed that benefits should not be denied solely on the basis of a negative X-ray. 30 U.S.C. 923(b). It further provided that a miner should be presumed to be entitled to benefits, despite an X-ray that was negative for complicated pneumoconiosis, if he had worked in coal mines for 15 years and other medical evidence demonstrated that the miner had a totally disabling pulmonary impairment. 30 U.S.C. 921(c)(4). Congress repealed that presumption in 1981. Pub. L. 97-119, § 202(b)(1), 95 Stat. 1643.

governed the Part C program as well as the Part B program. Under those regulations, ventilatory and blood-gas studies and evidence of certain heart abnormalities could justify a finding of total disability. 20 C.F.R. 410.424, 410.426(b) & Subpt. D App.[5] In addition to proving that they were totally disabled, claimants also had to establish that they had pneumoconiosis and that their disability arose out of their coal mine employment.

In 1972, at the same time that it promulgated its permanent regulations, HEW promulgated an "interim" regulation applicable only to Part B claims. 20 C.F.R. 410.490(b). The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate claimants. *Mullins Coal Co.*, slip op. 16-17; 20 C.F.R. 410.490(a). It provided a rebuttable presumption that a claimant was totally disabled due to pneumoconiosis where he (a) presented X-ray, biopsy, or autopsy evidence establishing the existence of pneumoconiosis (20 C.F.R. 410.490(b)(1)(i)) or, in the case of one employed as a miner for at least ten years,[6] presented ventilatory study scores showing impairment (20 C.F.R. 410.490(b)(1)(ii)),

[5] Ventilatory studies, which measure the ability of the lungs to move air in and out, may establish the presence of a respiratory or pulmonary disease that may or may not be pneumoconiosis. Blood-gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood. See *Mullins Coal Co.*, slip op. 5; Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 737-743 (1981).

[6] HEW's interim regulation is somewhat unclear as to how long a claimant had to work in coal mines to establish the interim presumption by means of ventilatory studies. In one part it requires 15 years of coal mine employment (20 C.F.R. 410.490(b)(1)(ii)), but later apparently requires only ten years of coal mine employment (20 C.F.R. 410.490(b)(3)).

and (b) demonstrated that the impairment arose out of coal mine employment (20 C.F.R. 410.490(b)(2)). The ventilatory study scores in the interim regulation required claimants to show a much less severe degree of impairment than was required under HEW's permanent regulations. Compare 20 C.F.R. 410.490(b)(1)(ii) with 410.426(b). With respect to causation, while claimants presenting ventilatory study scores, but not X-ray evidence, could establish the presumption only if they had worked in coal mines for ten years, it was presumed that their pneumoconiosis arose out of coal mining (20 C.F.R. 410.490(b)(3)). Claimants presenting X-ray, biopsy, or autopsy evidence of pneumoconiosis would be presumed to have shown causation if they had worked in coal mines for ten years. 20 C.F.R. 410.416, 410.456, 410.490(b)(2). Claimants presenting X-ray, biopsy, or autopsy evidence who had not worked in coal mines for ten years could also establish the presumption by proving causation in other ways (*ibid.*).[7]

The interim regulation specifically provided that, if the presumption was invoked, it could be rebutted by evidence that the miner was doing work comparable to his or her usual coal mine work or was able to do so. 20 C.F.R. 410.490(c). If a miner failed to invoke the presumption, he

[7] While the regulation did not specifically address how a miner with fewer then ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant could establish causation by showing that exposure to lung irritants other than coal mine dust was not the likely cause of his pneumoconiosis. HEW required claimants with five to nine years of coal mine employment to show that they had fewer than ten years of work in another job involving exposure to dust hazards. Claimants with fewer than five years of coal mine employment had to show that the disease arose within five years of that employment. See *Report of the Comptroller General of the United States, Examination of Allegations Concerning Administration of the Black Lung Benefits Program* 3 (1976).

nevertheless could establish that he qualified for benefits under HEW's permanent regulations. 20 C.F.R. 410.490(e).[8]

b. *Labor's regulations.* Prior to 1978, the Department of Labor, in adjudicating Part C claims, applied HEW's permanent regulations (see 20 C.F.R. 718.2 (1976)), but not its interim presumption, which by its terms applied only to Part B claims (20 C.F.R. 410.490(b)). By amendments enacted in 1978, Congress gave the Secretary of Labor authority to issue regulations defining "total disability" under the Part C program by directing the Secretary to "establish criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95; 30 U.S.C. 902(f)(1)(D). In addition, Congress instructed the Secretary to reopen claims that had been denied before the effective date of the 1978 amendments. 30 U.S.C. 945. It provided in Section 402(f)(2), 30 U.S.C. 902(f)(2), that, in adjudicating the reopened claims and claims filed before the promulgation of final Labor Department regulations, the "[c]riteria applied by the Secretary of Labor * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." Thus, Labor was to apply "criteria" no more restrictive than those applied by HEW, including the criteria in its interim regulation, to claims filed before it promulgated final regulations, which were promulgated on April 1, 1980.

[8] For example, a claimant who worked fewer than ten years in coal mines and did not have X-ray evidence of lung damage, but did have a ventilatory study score showing a significant pulmonary disability, would not qualify under HEW's interim presumption, but might qualify under HEW's permanent regulations. See 20 C.F.R. 410.414, 410.426(b).

The Secretary of Labor promulgated interim regulations in 1978 to govern the claims Congress ordered reopened and those filed before final regulations were promulgated. The regulations included an "interim presumption" of total disability from pneumoconiosis arising from coal mine employment—and thus of entitlement to benefits—applicable in circumstances that are similar, but not identical, to those set out in HEW's interim regulation. 20 C.F.R. 727.203. It provides, like HEW's interim regulation, that claimants may utilize X-ray, biopsy, or autopsy evidence or ventilatory studies satisfying medical criteria identical to those in HEW's interim regulation to establish the presumption. 20 C.F.R. 727.203(a)(1) and (2). It goes beyond HEW's regulation in allowing the presumption to be triggered by blood-gas studies, by other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). At the same time, however, the presumption of entitlement could be established under Labor's interim regulation only by claimants who worked in coal mines for at least ten years. 20 C.F.R. 727.203(a)(1). Thus, claimants who worked in coal mines for fewer than ten years and presented X-ray evidence showing pneumoconiosis could not, as under HEW's interim regulation, gain the benefit of the presumption of entitlement by relying on other evidence to show causation. In that event, they could not trigger the presumption at all.[9]

[9] Miners with fewer than ten years' experience in coal mines could, however, qualify for benefits by proving, apart from any presumption, that they were totally disabled as a result of pneumoconiosis arising out of coal mine employment. The Benefits Review Board does not apply the rules HEW applied in cases involving miners with fewer than ten years' experience (see note 7, *supra*), but instead has held that competent medical advice is sufficient to prove causation regardless of how many years a claimant worked in coal mines in cases where multiple causes are possible. See *Collura* v. *Director, Office of Workers' Compensation Programs,* 6 B.L.R. 1-100, 1-103 (1983), aff'd in part, petition dismissed without published opinion, 738 F.2d 421 (3d Cir. 1984). It is also the position of the Director of the Office of Workers' Compensation Programs that lay testimony is sufficient to prove causation from coal mine employment in cases where the evidence does not suggest other causes of the disease.

Like HEW's interim regulation, Labor's interim regulation provided that the presumption could be rebutted by proof that a claimant was doing or was capable of doing his usual coal mine work or work comparable to it. 20 C.F.R. 727.203(b)(1) and (2). Labor's interim regulation also provided that the presumption could be rebutted by proof that a claimant's disability did not arise in whole or in part out of coal mine employment or that the miner did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).[10] Labor's interim regulation also provided that anyone failing to qualify for the presumption of eligibility could seek to establish eligibility under Labor's final regulations (20 C.F.R. 727.203(d)), which are set forth at 20 C.F.R. Pt. 718. Claims filed after April 1, 1980, are adjudicated under those final regulations, which do not contain a presumption of entitlement comparable to HEW's interim presumption or Labor's interim presumption.

2. *The merits issue.* Charlie Broyles and Bill Colley

[10] Labor construed its interim presumption to shift the burden of persuasion, not merely the burden of production. *Mullins Coal Co.,* slip op. 7 n.12. It is not clear whether HEW's interim regulation shifted the burden of persuasion. Other presumptions in the Black Lung Benefits Act have been construed as shifting only the burden of production. *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 27 (1976); *Prokes* v. *Mathews,* 559 F.2d 1057, 1060 (6th Cir. 1977); but see *Alabama By-Products Corp.* v. *Killingsworth,* 733 F.2d 1511, 1514-1515 (11th Cir. 1984).

filed claims for black lung benefits under the Part C program before Labor's final regulations took effect in 1980. Both submitted X-rays showing the presence of pneumoconiosis. Because neither had ten years of coal mine employment, neither could invoke the presumption of entitlement under Labor's interim regulation.

An administrative law judge determined that Broyles had worked for five years as a coal miner from 1946 to 1952, after which he worked over 20 years at other occupations involving exposure to dust (87-1095 Pet. App. 11a-12a). Although the administrative law judge found it unclear which occupation had caused Broyles' pneumoconiosis, he gave Broyles "the benefit of the doubt" and concluded that coal mining had caused it (*id.* at 16a). The administrative law judge also assumed that Broyles, who retired in 1976 following coronary bypass surgery (*id.* at 14a-15a), was totally disabled. However, relying on physicians' reports, the administrative law judge denied Broyles' claim because his disability was not due to pneumoconiosis, but instead was caused by his heart condition (*id.* at 16a). The Benefits Review Board affirmed (*id.* at 7a-9a).

The administrative law judge determined that Colley, who had arthritis, chronic bronchitis, and had suffered a stroke in 1978 (87-1095 Pet. App. 26a, 27a), had worked in coal mines for no more than nine and a half years between 1945 and 1962 (*id.* at 24a-25a). The administrative law judge found it "questionable" whether the X-ray Colley had submitted showed that he had pneumoconiosis (*id.* at 25a), but denied the claim on the basis of physicians' reports supporting the conclusion that Colley's pulmonary condition was not causally related to his prior coal mine employment (*id.* at 28a). The Benefits Review Board affirmed (*id.* at 18a-21a).

The Fourth Circuit consolidated the two cases.[11] It re-

[11] Lisa Kay Colley was substituted as claimant for her father, who died prior to the court of appeals' decision.

versed on the ground that in each case the administrative law judge "erred in failing to evaluate the claims under [HEW's interim regulation], 20 C.F.R. § 410.490" (87-1095 Pet. App. 2a). Relying on *Halon* v. *Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3d Cir. 1983), and *Coughlan* v. *Director, Office of Workers' Compensation Programs,* 757 F.2d 966 (8th Cir. 1985), the court concluded that Labor's interim presumption regulation is contrary to Section 402(f)(2)'s directive that the Secretary apply "criteria" that are not more restrictive than the criteria applied by HEW in its interim regulation (87-1095 Pet. App. 5a).[12] The court found Labor's interim regulation inconsistent with the statute because, under HEW's interim regulation but not under Labor's interim regulation, claimants such as Broyles and Colley, who submitted X-rays showing pneumoconiosis, could invoke the presumption of entitlement to benefits even if they had worked in coal mines for fewer than ten years. It rejected the Secretary's argument that Congress intended in Section 402(f)(2) that the Department of Labor should apply *medical* criteria no more restrictive than those applied by HEW to claims filed before Labor's permanent regulations were in place, but that Congress did not intend to require Labor to apply the same evidentiary standards and adjudicatory rules applied by HEW (87-1095 Pet. App. 5a).[13] The court remanded for reevaluation of Broyles' and Colley's claims (*id.* at 6a).

[12] In a divided opinion in *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (1987), petition for cert. pending, No. 87-1045, the Sixth Circuit also followed *Halon* and *Coughlan.*

[13] In so concluding, the Fourth Circuit did not refer to the decision of the Seventh Circuit in *Strike* v. *Director, Office of Workers' Compensation Programs,* 817 F.2d 395, 400 (1987), which expressly rejected the holdings in *Halon* and *Coughlan.* The Seventh Circuit

3. *The procedural issue.* The Eighth Circuit's decision in *Sebben* involves a mandamus action by four named plaintiffs on behalf of a putative class of unsuccessful claimants. The putative class members, like Broyles and Colley, had submitted X-rays showing the presence of pneumoconiosis but were denied the presumption of entitlement to benefits under Labor's interim regulation because they had not worked in coal mines for ten years (87-827 Pet. App. 18a).[14] The claims of some of the members of the putative class were denied before the 1978 amendments were enacted, reopened in light of the 1978 amendments, and again denied. Others filed claims after the 1978 amendments took effect but before the Secretary's final regulations were promulgated in 1980. The putative class members either failed to exhaust their administrative remedies or failed to seek judicial review of the final administrative denial of benefits. The plaintiffs sought to compel the Secretary of Labor to reopen the claims of the class members and reconsider them under the standard set forth in *Coughlan*. The district court denied the application for a writ of mandamus without certifying a class (87-827 Pet. App. 19a-22a).

The Eighth Circuit reversed (87-827 Pet. App. 1a-18a). It acknowledged that mandamus is warranted only where

found "criteria," as used in Section 402(f)(2), ambiguous, noting that the final sentence of the immediately preceding subsection specifically refers to " 'criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners' " (817 F.2d at 401 (citation omitted)). Given the ambiguity, the court examined the legislative history of the provision and concluded that the Department's interpretation is consistent with the intent of Congress (*id.* at 402-404). Judge Weis, dissenting in *Halon*, had reached the same conclusion.

[14] The class is limited to those who submitted X-ray evidence, and does not include those seeking to trigger the presumption by relying on autopsy or biopsy evidence. 87-827 Pet. App. 18a.

there has been a " 'patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review' " and the agency had "a clear nondiscretionary duty to act" (*id.* at 4a (quoting *Nader* v. *Volpe*, 466 F.2d 261, 265-266 (D.C. Cir. 1972)). With respect to members of the putative class whose claims had been reopened and denied after the 1978 amendments, the court held that the Secretary has a duty to reopen them again because "[e]ven if review of those claims did occur, the Secretary did not do so under the proper standard" (87-827 Pet. App. 12a). As to claimants whose claims were first denied after the 1978 amendments, the court held that the Secretary "owes the same duty to these claimants to reopen and consider their claims" (*id.* at 12a-13a).

The Eighth Circuit rejected the argument that it should not order the claims reopened because the claimants had failed to exhaust their administrative remedies or seek review in a court of appeals in timely fashion. Without citation to any explicit legislative decision to relax the statutory deadlines, the court noted that "Congress had the authority to waive the limitation created by the deadlines" (87-827 Pet. App. 15a). With respect to those claims that had been reopened after the 1978 amendments and denied again, the court concluded that, in ordering reopening in 1978, "Congress, by implication, waived the thirty and sixty-day deadlines for appeals" (*id.* at 15a) and concluded that "[t]he Secretary has yet to take properly 'into account' the 1977 amendments" (*id.* at 16a). As to the later-filed claims, the court concluded that "[i]t would * * * be contrary to congressional intent to allow" those claims to be treated differently (*ibid.*). Furthermore, the court stated, the 30-day and 60-day deadlines "become largely unmeaningful for actions based on jurisdictional grants outside of" the Black Lung Benefits Act, such as the

mandamus statute (*id.* at 17a). It remanded the case for certification of a class whose claims the Secretary would have to reopen (*id.* at 2a n.1, 18a).

SUMMARY OF ARGUMENT

I. The Secretary of Labor reasonably concluded that Congress in Section 402(f)(2) mandated the application of medical criteria no more restrictive than those in HEW's interim regulation, but did not require the Department of Labor to apply other aspects of HEW's interim regulation. Section 402(f)(2)'s requirement that Labor apply no more restrictive "criteria" is set forth as part of the definition of "total disability," and while medical evidence is plainly relevant to that issue, a miner's years of service bear primarily on the question of causation. The structure of the statute therefore suggests that the term "criteria" as used in defining "total disability" means medical criteria only, and it was reasonable to conclude that miners with fewer than ten years of coal mine experience could be denied the opportunity to invoke a presumption of entitlement to benefits.

The legislative history also supports this conclusion. It shows that the language of Section 402(f)(2) was proposed in response to testimony that the ventilatory study scores applied by Labor in adjudicating Part C claims required a greater degree of impairment than was required under Part B and that, as a result, the approval rate was much lower under the Part C program. The House reports make clear that it intended to require Labor to apply *medical* criteria no more restrictive than those applied by HEW. The Senate, apparently more impressed than the House by testimony that the discrepancy in approval rates between the Part B and Part C programs was due to the unwarranted laxness of the ventilatory study scores in

HEW's interim regulation, passed a bill giving the Secretary of Labor authority to promulgate new medical criteria. The Conference Committee incorporated both approaches. In Section 402(f)(1)(D), following the Senate approach, it provided that the Secretary of Labor was to "establish [new] criteria for all appropriate medical tests." In Section 402(f)(2), which immediately follows Section 402(f)(1)(D), it adopted the House approach pending promulgation of these new criteria by providing that Labor was to apply "criteria" no more restrictive than those in HEW's interim regulation to claims filed before the final regulations were promulgated. In light of this history of the enactment of the language of Section 402(f)(2), the Secretary reasonably construed the word "criteria" to be shorthand for the phrase "criteria for all appropriate medical tests" in the preceding sentence.

Moreover, it is especially unlikely that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience since the evidence before Congress showed that miners with fewer than ten years of coal mine experience rarely contract black lung disease. The Conference Report stated that all regulatory presumptions were to include the statutory presumption that pneumoconiosis resulted from coal mine employment where a miner had worked ten years in coal mines, and that is what Labor's interim regulation provided. Furthermore, the House Committee approved Labor's interim regulation after reviewing it and noting that the interim presumption could be established only by miners with ten years' experience.

In light of the statutory language and its legislative history, the Secretary's construction of the term "criteria" in Section 402(f)(2) is more plausible than that adopted by the Fourth Circuit. The Secretary's construction is at least a permissible construction, so the Fourth Circuit erred by failing to defer to it.

II. Assuming that the Secretary's construction of Section 402(f)(2) is erroneous, the Eighth Circuit nevertheless erred in holding that a writ of mandamus should issue ordering the reopening of claims that had been finally denied. Mandamus is warranted only where the defendant owes the plaintiff a clear nondiscretionary duty. Mandamus is not warranted where the interpretation of a statute is a prerequisite to the establishment of the duty that is said to be owed, because, in such a case, no *clear* duty is owed, and Section 402(f)(2) does not plainly require the construction respondents favor. In any event, the Secretary has no duty to reopen the claims of the members of the putative class. The 1978 amendments required the reopening of certain claims, but those claims were reopened; the amendments did not require any further reopening.

Mandamus is also unavailable because members of the putative class failed to appeal adverse decisions, and exhaustion of statutory remedies is a prerequisite to mandamus relief. Application of that rule is particularly sensible here because, if members of the putative class had raised their challenge to Section 402(f)(2) and pursued it administratively, cases where the construction of the statute might have made a difference would have been identified. In addition, the Eighth Circuit's reopening order flouts the statutory appeal deadlines.

The fact that members of the putative class failed to challenge the denials of their claims in timely fashion also leads to the conclusion that their claims are barred by res judicata. Where, as here, the administrative proceeding has the essential characteristics of a judicial proceeding and the plaintiffs could have advanced a legal argument in the administrative proceeding, they should be barred from raising the claim in a subsequent proceeding. Any other rule fails to establish repose and leads to costly repetitive litigation, as this case illustrates.

ARGUMENT

I. THE DEPARTMENT OF LABOR REASONABLY CONSTRUED SECTION 402(f)(2) TO REQUIRE THAT THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART C CLAIMS NOT BE MORE RESTRICTIVE THAN THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART B CLAIMS

A. *The Structure and Context Of The Statute Support The Secretary's Construction*

Although Section 402(f)(2) requires the Secretary of Labor to apply "criteria" no more restrictive than those applied by HEW to claims filed before the final regulations were promulgated, Congress did not define the term "criteria," and the proper definition cannot be discerned from the word alone.[15] The Secretary's construction—that Congress intended Labor to apply medical criteria no more restrictive than those in HEW's interim regulation to

---

[15] "Criteria" is defined as "a standard on which a judgment or decision may be based" (*Webster's New Collegiate Dictionary* 307 (1983)) and its meaning varies according to what is to be judged or decided. The Sixth Circuit in *Kyle*, which held that Labor's interpretation is contrary to the statute, nevertheless conceded that "[m]anifestly, the term 'criteria' is subject to numerous possible interpretations" (819 F.2d at 142). Similarly, in *Strike*, the Seventh Circuit, which upheld the Secretary of Labor's interim regulation, stated that the "meaning of the statute is ambiguous" (817 F.2d at 401).

Representative Simon stated with respect to Section 402(f)(2) that "the language in this bill is crystal clear." 124 Cong. Rec. 3431 (1978). While Representative Simon's conclusion that the language enacted is clear beyond dispute has surely not received uniform acceptance, it is noteworthy that he thought it clear that under Section 402(f)(2) "[t]he Department of Labor is required to apply *medical* criteria no more restrictive than criteria" applied under HEW's interim regulation (*ibid.* (emphasis added)).

such claims, but did not require Labor to allow claimants with fewer than ten years' coal mine experience to establish a presumption of entitlement to benefits—is strongly supported by the structure and context of the statute.

The "no more restrictive criteria" requirement appears in Section 402(f), which is the provision of the Black Lung Benefits Act that defines "total disability." Medical evidence, like vocational evidence, is relevant to the question whether a miner is totally disabled, since the Act defines total disability as the inability to perform coal mine work or work requiring comparable abilities (Section 402(f)(1)(A)). But evidence as to how long a claimant worked in coal mines has only the most indirect bearing on the issue of total disability, as distinct from whether a claimant's pneumoconiosis arose from coal mine employment. Congress, in amending the definition of "total disability" to require the application of criteria no more restrictive than those employed under HEW's interim regulation, cannot without justification be assumed to have referred to criteria whose main relevance is to the separate issue of causation. If Congress had intended to require Labor to apply HEW's interim regulation in its entirety, it presumably would have amended the statutory presumption provision, 30 U.S.C. 921(c)(4), to mandate the use of that provision. The fact that it instead modified the definition of "total disability" supports the conclusion that it was referring to medical criteria by which that disability is to be judged, and not to adjudicatory and evidentiary rules bearing on how the pneumoconiosis came about.

B. ***The Legislative History Of Section 402(f)(2) Supports The Conclusion That "Criteria" Means Medical Criteria And Not Evidentiary And Adjudicatory Rules***

1. Congress's purpose in amending Section 402(f) in 1978 further supports the Secretary's conclusion that Congress meant "criteria" in Section 402(f)(2) to mean medical criteria and not to include adjudicatory and evidentiary rules.[16] The members of the House of Representatives who favored the 1978 amendment ultimately adopted as Section 402(f)(2) were particularly concerned that the ventilatory study scores applicable to Part C claims under HEW's permanent regulations (20 C.F.R. 410.426(b)) were much stricter than the scores applicable to Part B claims under HEW's interim regulation (20 C.F.R. 410.490(b)(1)(ii)). The amendment had its genesis in 1974, after the 1972 amendments had taken effect, when the House held hearings and a representative of the United Mine Workers complained that the approval rate for claims filed under the Part C program was much lower than the approval rate for claims filed under the Part B program. *Black Lung Amendments of 1973: Hearings on H.R. 3476 Before the General Subcomm. on Labor of the House Comm. on Education and Labor,* 93d Cong., 1st Sess. 351 [hereinafter *1974 Hearings*] (statement of Bedford W. Bird). The Mine Workers' representative ex-

---

[16] This Court, in footnote 31 of the *Mullins Coal Co.* opinion (slip op. 22), appeared to assume that the adjudicatory and evidentiary rules in Labor's interim regulation could be no more restrictive than those in HEW's interim regulation. Neither that assumption, which was not necessary to the decision there, nor the Court's statement that Labor's interim regulation "satisfies Congress' demand that Labor's criteria 'shall not be more restrictive than the criteria applicable' " under HEW's interim presumption (slip op. 18), should be viewed as controlling this case, where the issue is actually presented.

plained that the low approval rate under the Part C program was the result of the fact that the "ventilatory test scores [in HEW's permanent regulations] are only minimally different from the scores used to evaluate permanent disability under the Social Security disability program" (*id.* at 353). He recommended that Congress enact "an explicit provision extending the so-called 'interim' *medical* criteria" (*ibid.* (emphasis added)). The Director of the Appalachian Research and Defense Fund, a legal services group that represents miners, agreed that "[t]he ventilatory study standards are what makes [*sic*] the difference" (*id.* at 398 (statement of John Rosenberg)). The Department of Labor's representative, who was criticized by some members of the committee because the medical standards applied in determining whether a miner was disabled were stricter under Part C than Part B (see *1974 Hearings* 329 (statement of Chairman Perkins) and 399 (statement of Rep. Dent)), noted that "we are only talking about one standard[,] the ventilatory [standard]." *Id.* at 398 (statement of Nancy Synder).

The House responded with bills amending the definition of total disability to require HEW to adjudicate Part C claims under standards no more restrictive than those applied to Part B claims. See H.R. 3333, 94th Cong., 1st. Sess. § 3 (1975); H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 10760, 94th Cong. 1st Sess. § 7(a) (1975). The committee report to one of those bills explained that such a requirement was necessary because "the Department of Health, Education, and Welfare, exercising authority provided under the current law, has literally saddled the Department of Labor with rigid and difficult *medical* standards for measuring claimant eligibility under part C of the program. The so-called 'permanent' *medical* standards now in effect under part C are much more demanding than

the so-called 'interim' standards applied by HEW under part B of the program." H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975) (emphasis added). The report stated that the House bill "would require that standards no more restrictive than the 'interim' *medical* standards shall be equally applicable to part C claims" (*id.* at 15 (emphasis added)). These explanatory comments are identical to the comments that accompanied the version of the bill initially passed by the House. See H.R. Rep. 95-151, 95th Cong. 1st Sess. 14 (1977).[17]

Like the House, the Senate focused on the fact that HEW's interim ventilatory study scores "are far less stringent" than the scores in its permanent regulation. S. Rep. 95-209, 95th Cong., 1st Sess. 13 (1977). However, it ultimately determined not to require continued application of HEW's interim medical criteria. The Senate Report noted HEW's assertions "that the interim standards do not accurately determine actual disability, that they were used under part B only to clear away the backlog of claims arising from the 1972 amendments, and that the permanent standards more accurately identify disabling respiratory and pulmonary functions in coal miners" (*ibid.*). The report also noted that the United Mine Workers considered even HEW's interim ventilatory study scores too stringent (*ibid.*). The Senate concluded that it was "not qualified to assess the appropriateness of medical test standards to be used to determine disability in coal miners" (*ibid.*) and the bill it passed gave the Secretary of Labor authority to define the term "total disability" without reference to previously applied criteria (*id.* at 34-35).

---

[17] That version of the bill would have amended Section 402(f) simply by providing that "[w]ith respect to a claim filed after June 30, 1973, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973" (H.R. Rep. 95-151, *supra*, at 52).

The Conference Committee reconciled the differing approaches of the House and Senate bills by adopting the Senate approach on a permanent basis and the House approach pending promulgation of Labor's regulations. H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978). Congress resolved the controversy over whether the ventilatory study scores used to adjudicate Part C claims were too strict or those used to adjudicate Part B claims were too lax by directing the Secretary of Labor in Section 402(f)(1)(D) to consult with the Director of the National Institute for Occupational Safety and Health and "establish *criteria for all appropriate medical tests* * * * which accurately reflect total disability in coal miners" (emphasis added)). The statute's next section, Section 402(f)(2), directed the Secretary of Labor to use the "criteria" in HEW's interim regulation in adjudicating claims filed before Labor's final regulations took effect. In light of that placement and the history of the amendment, the Secretary of Labor reasonably concluded that "criteria" in Section 402(f)(2) is shorthand for the phrase used in the preceding sentence, "criteria for all appropriate medical tests." See *Strike* v. *Director, Office of Workers' Compensation Programs,* 817 F.2d 395, 401 (7th Cir.1987).[18]

[18] The Sixth Circuit suggested in *Kyle* that Congress's choice of the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D) and only "criteria" in Section 402(f)(2) shows that it intended "criteria" in the latter section to have a broader meaning (819 F.2d at 143). However, nothing in the legislative history supports such a conclusion. To the contrary, the fact that the House, which drafted the language that became Section 402(f)(2), focused on the difference between the ventilatory study scores used under Part B and Part C during the 1974 Hearings and repeatedly referred to *medical* criteria in its reports (H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975); H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977)) indicates that the criteria referred to in Section 402(f)(2) are medical criteria.

2. Congress therefore gave substantial attention to the problem of the medical standards to be used in determining whether a claimant was totally disabled. There is, on the other hand, no evidence in the language of the statute or its legislative history indicating that Congress intended to require the use of the adjudicatory and evidentiary rules of HEW's interim regulation until Labor's final regulations were promulgated. In particular, there is no evidence that Congress intended to preserve the ability of miners with fewer than ten years' experience to establish the presumption of entitlement to black lung benefits contained in HEW's interim regulation. To the contrary, as the Seventh Circuit noted in *Strike* (817 F.2d at 403-404 (emphasis added)): "The only reference to the use of presumptions in the conference report stated that '[t]he conferees also intend that *all* standards are to incorporate the presumptions contained in section 411(c) of the Act [30 U.S.C. § 921(c)].' H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 * * *. That Section creates a rebuttable presumption that pneumoconiosis arose out of coal mine employment '[i]f a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines.' 30 U.S.C. § 921(c)(1)." It is precisely that requirement of ten years' coal mining experience that was "expressly incorporate[d]" (817 F.2d at 404) into the Secretary of Labor's interim regulation.

Moreover, the summary of medical knowledge on coal worker's pneumoconiosis appended to the final House report concluded that there was broad agreement that "[t]he probability that coal miners will develop black lung increases regularly after about ten years of working underground." H.R. Rep. 95-151, *supra*, at 30. It added that the

study "with the most carefully selected samples of miners" showed that " '[t]here was little pneumoconiosis until miners had worked at least eleven years in the mines' " (*ibid.* (citation omitted)). In view of that recognition by the House, it would be surprising if Congress simultaneously acted to mandate the use of a presumption of entitlement to black lung benefits for miners with fewer than ten years' experience.[19]

Furthermore, post-enactment legislative history demonstrates that the Congress that adopted Section 402(f)(2) was not concerned with the adjudicatory and evidentiary rules used by HEW. Shortly after the 1978 amendments were enacted, the members of the House Committee reviewed and commented on Labor's interim regulation before it was adopted in final form. See *Strike*, 817 F.2d at 404; *Halon*, 713 F.2d at 30 (Weis, J., dissenting). The committee stated that it "strongly supports the

[19] The Sixth Circuit in *Kyle*, like most of the other courts that have held that Labor's interim regulation is inconsistent with Section 402(f)(2), relied on the assertion that the "general purpose" of the 1978 amendments "appears to have been to liberalize the standards under which black lung benefits were being awarded at the time" (819 F.2d at 142). That statement is not entirely accurate and certainly does not compel the conclusion that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience. Congress heard evidence both that HEW's permanent ventilatory study standards were too strict and that HEW's interim ventilatory study standards were too lax. It ultimately responded by instructing Labor to devise new medical standards, which is not a liberalizing of the standards. In the interim, it instructed Labor to apply HEW's interim ventilatory study standards, which did have a liberalizing effect. But that does not indicate that Congress intended to mandate that miners with fewer than ten years' experience be allowed to establish a presumption of entitlement to benefits, and it is improbable that it so intended in light of the evidence before it that those miners were unlikely to suffer from black lung disease.

re-promulgation of the interim standards, as found in Section 727.203(a)" (87-821 Pet. App. 44a). It expressly recognized that ten years of coal mine employment was required to invoke the presumption in that section (*id.* at 46a) and never hinted that that requirement violated the statute. These comments are entitled to considerable weight since they reflect the contemporaneous view of the authors of the legislation. *North Haven Board of Education* v. *Bell,* 456 U.S. 512, 526-527, 533-534 (1982); *Talley* v. *Mathews,* 550 F.2d 911, 920 (4th Cir. 1977)). They further confirm the correctness of Labor's interpretation. See *Consolidated Rail Corp.* v. *Darrone,* 465 U.S. 624, 634 (1984).

Finally, it has been contended that Labor's interim regulation is also invalid in that it authorizes rebuttal by two methods not explicitly set forth in HEW's interim regulation, which explicitly allows rebuttal only on the ground that the claimant is doing or is capable of doing his usual coal mine work. 20 C.F.R. 410.490(c). See page 9, *supra.* This issue is pending in the Sixth Circuit in *Youghiogheny & Ohio Coal Co.* v. *Miliken,* No. 88-3213, and *Grant* v. *Director, Office of Workers' Compensation Programs,* No. 87-3674; see also *Sulyma* v. *Director, Office of Workers' Compensation Programs,* 827 F.2d 922, 924 (3d Cir. 1987).[20] If HEW's interim regulation really confines rebuttal evidence to that which it specifically authorizes, and if Section 402(f)(2) requires Labor to apply the adjudicatory and evidentiary rules embodied in HEW's interim regulation, Labor's inclusion of additional rebuttal methods does, indeed, make its regulation "more restrictive" than HEW's and thus is contrary to the

[20] The issue was raised but not decided in *Consolidation Coal Co. v. Smith,* 837 F.2d 321 (8th Cir. 1988).

statute.[21] We submit that Congress could not have intended such a result, and that this fact gives further support to the Secretary's interpretation of the statute.

Specifically, such an argument suggests that Labor's interim regulation is invalid insofar as 20 C.F.R. 727.203(b)(3) and (4) authorize rebuttal by showing that the claimant's disability did not arise out of coal mine employment or is not due to pneumoconiosis. However, Congress enacted the Black Lung Benefits Act to provide benefits to a coal miner "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment" (*Mullins Coal Co.*, slip op. 5). To deny coal mine operators the ability to prove that a claimant does not have pneumoconiosis or that his disability did not arise out of coal mine employment would therefore appear to be irrational and perhaps even suspect on due process grounds. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 34-37 (1976) (construing Section 411(c)(4) not to limit the evidence a coal mine operator may present on

[21] The Department of Labor does not think that the rebuttal methods set out in HEW's interim regulation were meant to be exhaustive. See 43 Fed. Reg. 36826 (1978). The Benefits Review Board, however, thinks that HEW's interim regulation did not allow for rebuttal by proof that the claimant did not have pneumoconiosis or the claimant's disability did not arise out of coal mine employment. *Whiteman* v. *Boyle Land & Fuel Coal Co.*, No. 87-348 BLA (May 2, 1988), slip op. 3. At the same time, though, the Board believes that HEW's interim regulation cannot be applied to Part C claims because coal mine operators were not given the opportunity to comment on it as required by the Administrative Procedure Act and that the additional rebuttal methods in Labor's regulation should be applied (*id.* at 3-4).

rebuttal, thus avoiding a constitutional challenge); *Mullins Coal Co.*, slip op. 22 n. 32. It would also appear to be contrary to the statutory command that "all relevant evidence shall be considered." 30 U.S.C. 923(b); *Mullins Coal Co.*, slip op. 13. To avoid these problems, it is sensible to construe the reference to "criteria" in Section 402(f)(2) as encompassing medical standards, but not adjudicatory or evidentiary rules.[22]

C. *The Secretary's Interpretation Of Section 402(f)(2) Is Entitled To Deference*

The Department of Labor's construction of "criteria" in Section 402(f)(2) as referring to medical criteria, but excluding evidentiary and adjudicatory rules is more consistent with the language of the statute and its legislative history than the alternative interpretation the Fourth Circuit adopted. In addition, Labor's interpretation in its 1978 regulation of a term added in the 1978 amendments represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); see also *Morrison-Knudsen Contruction Co.* v. *Director, Office of*

[22] The Sixth Circuit, while holding in *Kyle* that Labor's interim regulation is contrary to Section 402(f)(2) because it does not allow claimants with fewer than ten years of coal mine work to invoke the presumption of total disability, suggested that Labor's interim regulation is not inconsistent with the statute insofar as it authorizes additional rebuttal methods. 819 F.2d at 144; see also *Warman* v. *Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 258 n.1 (6th Cir. 1988); *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 490 (6th Cir. 1985). The court did not explain why it was permissible for Labor's interim regulation to be more restrictive in authorizing additional rebuttal methods.

Workers' Compensation Programs, 461 U.S. 624, 635 (1983). And where " 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *NLRB* v. *United Food Workers Union, Local 23,* No. 86-594 (Dec. 14, 1987), slip op. 10 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Since Labor's contemporaneous construction of Section 402(f)(2) is reasonable, that construction is entitled to deference.

II. THE EIGHTH CIRCUIT ERRED IN ORDERING THE REOPENING OF FINAL, DENIED CLAIMS

If this Court holds that the Secretary of Labor permissibly construed Section 402(f)(2), then the Eighth Circuit plainly erred by ordering the reopening of the putative class members' claims. However, as explained below, assuming arguendo that Labor erroneously interpreted Section 402(f)(2), the Eighth Circuit nevertheless erred in ordering the reopening of thousands of claims that had been finally denied. And that error, if uncorrected, will have serious consequences on the system by which black lung claims are presently resolved. As explained in our petition for a writ of certiorari (87-827 Pet. 10-12), approximately 94,000 claims, most of which were finally denied more than six years ago, will have to be reopened if the Eighth Circuit's decision is affirmed and a nationwide class is certified. Since administrative law judges currently issue about 10,000 decisions each year in black lung cases, such a massive reopening effort would very likely create a significant backlog in a system that is already severely backlogged. See *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the*

House Comm. on Government Operations, 99th Cong., 1st Sess. (1985) [hereinafter *1985 Hearing*]; *Report to the Honorable Donald J. Pease, House of Representatives, by the General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* (1984) (*reprinted in* the *1985 Hearing* 37).

A. *Mandamus Relief Is Unavailable Because Members Of The Putative Class Were Owed No Clear Nondiscretionary Duty And Failed To Exhaust Their Statutory Remedies*

1. "This Court repeatedly has observed that mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, No. 86-1329 (Mar. 22, 1988), slip op. 17-18, citing *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). As codified at 28 U.S.C. 1361,[23] mandamus is warranted "only if the defendant owes [the plaintiff] a clear nondiscretionary duty." *Heckler* v. *Ringer,* 466 U.S. 602, 616 (1984). See also *Gulfstream Aerospace*, slip op. 18; *Kerr*, 426 U.S. at 403. The Secretary of Labor did not breach any clear nondiscretionary duty owed to members of the putative class.

The Department of Labor followed the directive of Section 402(f)(2) and considered (in some cases, reconsidered), under its interim regulation, claims filed before the final regulations were promulgated. The Eighth Circuit found a breach of a clear duty because it concluded that the interim regulation conflicted with the statute. But, even assuming that the interim regulation is inconsistent

---

[23] Section 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

with Section 402(f)(2), mandamus is not warranted because where the existence of a duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States ex rel. Kadrie,* 281 U.S. 206, 219 (1930). Otherwise stated, "the mandamus remedy is only available 'under *exceptional* circumstances of *clear illegality*. When the performance of official duty calls for a construction of governing law, the [federal] officer's interpretation will not be disturbed by a writ of mandamus unless it is *clearly wrong* and his official action is arbitrary and capricious.' " *Homewood Professional Care Center, Ltd.* v. *Heckler,* 764 F.2d 1242, 1251 (7th Cir. 1985) (emphasis in original) (quoting *Americana Healthcare Corp.* v. *Schweiker,* 688 F.2d 1072, 1084 (7th Cir. 1982), cert. denied, 459 U.S. 1202 (1983)). See also *Maczko* v. *Joyce,* 814 F.2d 308, 310 (6th Cir. 1987) ("when a duty is disputed or subject to various interpretations * * * the duty is not 'owed' in that the obligation to do a particular act cannot be said to be clear, peremptory, defined or ministerial"), cert. denied, No. 86-2020 (Oct. 5, 1987). In light of the conflict in the circuits on the merits issue (and the dissenting opinions in two of the cases where the courts held that the Secretary's interim regulation conflicts with the statute), it can hardly be argued that the Secretary's construction is so clearly wrong as to warrant mandamus.

Respondents attempt to avoid the "clear illegality" requirement by suggesting that it no longer applies when a court of appeals must construe a statute to decide whether a clear legal duty exists.[24] Under their theory, a court may

[24] The putative class respondents dismiss decisions such as this Court's decision in *Wilbur* as "old cases." 87-821 Br. in Opp. 21.

construe a statute the interpretation of which is in doubt and, if it concludes that the statute, as construed, creates a duty, then such a duty clearly exists. See, *e.g., Government of Virgin Islands* v. *Douglas,* 812 F.2d 822, 832 n.10 (3d Cir. 1987); *13th Regional Corp.* v. *United States Dep't of Interior,* 654 F.2d 758, 760 (D.C. Cir. 1980). We submit that mandamus cannot be so justified. Even if it could, however, such a theory would not be applicable here because nothing in the statute compels the Secretary to reopen their claims now. To support the action it took, the Eighth Circuit not only had to conclude (wrongly in our view) that the statute plainly means what respondents say it means, but also that the statute plainly requires the Secretary to reopen (and, in some cases, re-reopen) claims that had been finally denied. The statute directed the Secretary to reopen some claims, and they were reopened. Nothing in the statute requires the Secretary to reopen those claims again, or to reopen the other claims that were first denied under Labor's interim regulation, and the Secretary accordingly has no duty, much less a clear nondiscretionary duty, to do so.

2. In addition, mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief." *Heckler* v. *Ringer,* 466 U.S. at 616. Mandamus is plainly unwarranted here because members of the putative class failed to exhaust the statutory remedies that were open to them and, if pursued, might have provided the relief they seek.

The Black Lung Benefits Act, which incorporates adjudicatory provisions of the Longshore and Harbor Workers' Compensation Act (see 30 U.S.C. (& Supp. III) 932(a)), provides a comprehensive review scheme that allows a claimant a full opportunity to contest the validity of regulations such as the interim presumption at issue here. Claims for benefits are presented to a deputy com-

missioner in the Department of Labor's Office of Workers' Compensation Programs, who is responsible for developing evidence, notifying responsible coal mine operators of potential liability, defining contested issues, and making an initial determination on eligibility. See 20 C.F.R. 725.351(a), 725.410-725.422. Any party who disagrees with the deputy commissioner's proposed resolution of the issues may obtain a hearing before an administrative law judge (ALJ) by requesting one within 30 days of the deputy's decision. 20 C.F.R. 725.419. After the ALJ rules, any party may seek review of that decision by the Benefits Review Board (20 C.F.R. 725.481), which "fulfill[s] the review function previously performed by district courts" (*Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985)), by filing a petition for review within 30 days of the ALJ's decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(a)); 20 C.F.R. 725.479. The Board has asserted, with court approval, that it has authority to invalidate regulations that it finds inconsistent with the Black Lung Benefits Act. *Gibas*; *Carozza* v. *United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *McCluskey* v. *Zeigler Coal Co.*, 2 B.L.R. 1-1248 (Ben. Rev. Bd. 1981).[25]

[25] In fact, whether Labor's interim regulation complies with Section 402(f)(2) was first raised, sua sponte, by Board member Miller, in *Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 B.L.R. 1-125, 1-128 (1981). The Board did not decide the issue in *Lynn* (*id.* at 1-126 n.1) or in *Halon* (see 713 F.2d at 31), the first court of appeals decision on the issue, because it had not been timely raised in either case. After *Halon*, the Board found the regulation consistent with the statute, but followed *Halon* in claims arising in the Third Circuit. See *Reilly* v. *Director, Office of Workers' Compensation Programs*, 7 B.L.R. 1-139, 1-144 (1984). Because the issue was unsettled before the Board until 1984, and because adminstrative law judges follow the Board where it disagrees with Labor Department regulations, respondents err in claiming (87-821 Br. in Opp. 16) that raising the issue would have forced members of the putative class, all of whom filed claims before April 1, 1980, through a "clearly futile pursuit of the entire administrative process and an appeal to a court of appeals."

Any party may petition the appropriate court of appeals for review of the Board's decison for legal error within 60 days. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(c)); 20 C.F.R. 725.482.

The members of the putative class have in common a failure to timely pursue the remedies statutorily available to them to challenge the denial of their claims. Some failed to challenge adverse decisions by a deputy commissioner, others failed to seek review of an adverse ALJ decision, and others failed to appeal adverse Benefits Review Board decisions to the court of appeals. See 87-827 Pet. App. 4a-5a. There is no question that the relief they now seek could have been ordered, had they pursued their claims. The claimants in *Halon, Coughlan, Kyle,* and *Broyles* obtained that relief, and the putative class respondents have suggested no reason why they failed to pursue their claims. Accordingly, there is no reason why the requirement for mandamus relief that a plaintiff "exhaust[] all other avenues of relief" (*Heckler* v. *Ringer,* 466 U.S. at 616) should be waived.[26]

There are substantial practical reasons for requiring exhaustion of the statutory remedies. See generally *McKart*

[26] The putative class respondents state (87-821 Br. in Opp. 19) that "the Secretary had denied claimants a right that could not, in principle, be vindicated if those claimants were required to pursue the administrative process on an individual basis." That is flatly wrong. If they had appealed and prevailed on the argument that the Secretary's interim regulation is contrary to Section 402(f)(2), and they qualified for the presumption of entitlement under HEW's interim regulation, they would have obtained the benefit of that presumption, which is

v. *United States*, 395 U.S. 185, 193-195 (1969). If putative class members had challenged Labor's construction of Section 402(f)(2) in a timely manner, the agency could have addressed it in individual cases and at least identified those cases where the interpretation of Section 402(f)(2) made a difference in the outcome. As matters now stand, it is not possible to determine which claimants might have been adversely affected by Labor's construction. Moreover, the Eighth Circuit's decision eviscerates the deadlines established for appealing denials of black lung benefits claims, which have been held to be jurisdictional. See, *e.g.*, *Bolling* v. *Director, Office of Workers' Compensation Programs*, 823 F.2d 165 (6th Cir. 1987); *Butcher* v. *Big Mountain Coal, Inc.*, 802 F.2d 1506 (4th Cir. 1986); and cases cited at 87-827 Pet. App. 17a n.13. Indeed, the court of appeals acknowledged that, in its view, those deadlines were "largely unmeaningful" (*id.* at 17a).

B. ***Reconsideration Of The Claims Is Barred By Res Judicata***

In addition to being barred from seeking mandamus relief because they failed to pursue the avenue of relief available to them under the Black Lung Benefits Act, the

---

what they now seek. The cases respondents cite in support of their claim that exhaustion should be excused, such as *Nader* v. *Volpe*, 466 F.2d 261, 269 (D.C. Cir. 1972) (district court may "preserve a substantial right from irretrievable subversion in an administrative proceeding"), are therefore not relevant to their claim. Moreover, as the Eighth Circuit noted (87-827 Pet. App. 4a), Labor has been applying adverse court of appeals decisions in cases pending in the relevant circuit on the date of the decision, so, after the first claimant in a circuit prevailed on the merits issue, no other claimant was required to continue to pursue it. And, in light of respondents' suggestion that it is unreasonable to expect claimants to retain counsel (87-821 Br. in Opp. 17), it should be noted that the Act requires responsible operators or the Black Lung Disability Trust Fund to pay prevailing claimants' attorneys' fees. See 20 C.F.R. 725.362, 725.367.

putative class members are barred from attempting to relitigate their claims now by res judicata, because they failed to challenge the denials of their claims within the time limits Congress established. It is well settled that a final judgment of a court on the merits of an action "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Relitigation is barred even if the final, unappealed judgment was "wrong or rested on a legal principle subsequently overruled in another case" (*ibid.*). Similarly, under Section 83 of the Restatement (Second) of Judgments (1982), "a valid and final [administrative] adjudicative determination has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."

This Court has held that the unreviewed factfindings of state and federal administrative agencies are entitled to preclusive effect. *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), slip op. 10; *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966). The Court has also stated more broadly that res judicata would bar the relitigation of a "claim" that was the subject of an administrative determination. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948). Although this Court has not held that an unreviewed administrative judgment bars a party from litigating a legal issue that could have been raised but was not in the administrative action or on appeal (see 4 K. Davis, *Administrative Law Treatise* 49 (1983)), it has recognized the principle set forth in the Restatement of Judgments that the preclusive effect of an administrative decision is largely determined by whether the administrative forum has " 'the essential procedural characteristics of a court.' " *University of Tennessee*, slip op. 9 n.6 (quoting comments to Section 83 of the Restatement (Second) of Judgments).

The Restatement rule that parties are precluded from bringing actions raising legal issues that they could have raised in a prior administrative proceeding where the administrative proceeding had the essential characteristics of a judicial proceeding should be applied here. It is clear that black lung benefits claims are adjudicated in adversarial, court-like proceedings. Claimants (and operators) have the right to counsel (20 C.F.R. 725.362), may develop evidence and engage in discovery (20 C.F.R. 725.450-725.457), and receive written decisions with findings of fact and conclusions of law (20 C.F.R. 725.418(b), 725.477(b)). Review by the Benefits Review Board and then by a court of appeals is available after an ALJ decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921)). As noted (page 32, *supra*), the Board considers itself free to hold that Labor Department regulations conflict with the statute and, of course, a court of appeals has authority to reverse a benefit decision on the basis that the standards applied in the administrative proceeding were contrary to those required by the statute. If a party fails to seek timely review of a decision by a deputy commissioner, an administrative law judge, or the Benefits Review Board, the unreviewed decision becomes final.[27]

---

[27] Decisions are subject to modification only where there is "a change in conditions or a mistake in a determination of fact" and a request for modification is made within one year of the final decision. See 30 U.S.C. (& Supp. III) 932(a); 33 U.S.C. (& Supp. III) 922; 20 C.F.R. 725.310. This modification provision is not a basis for refusing to apply res judicata any more than the possibility of reopening district court judgments for various reasons under Fed. R. Civ. P. 60(b) is a reason for refusing to give judicial decisions preclusive effect. See *Downs* v. *Director, Office of Workers' Compensation Programs*, 803 F.2d 193, 199 n.13 (5th Cir. 1986) (res judicata applies despite modification possibilities).

Barring the putative class members from reviving their claims also makes sense. Res judicata " 'is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts.' " *Federated Department Stores*, 452 U.S. at 401 (citations omitted). Res judicata establishes "certainty in legal relations" (*Sunnen*, 333 U.S. at 597). There is no repose if courts are able to order the reopening of closed cases any time they believe an administrative adjudicator has misconstrued a directive in the governing statute.[28]

Subsequent claims for black lung benefits may be entertained where "the deputy commissioner determines that there has been a material change in conditions." 20 C.F.R. 725.309(d). That exception is necessary because pneumoconiosis is a progressive disease, so that a claimant who is not totally disabled when he first applies for benefits may subsequently become totally disabled as a result of black lung disease even if he was not exposed to coal dust in the interim. See Lopatto, *supra*, 85 W. Va. L. Rev. at 680. That exception is plainly not a valid basis for denying preclusive effect to administrative decisions in situations where the predicate for reconsideration—a material change in conditions—is not satisfied.

[28] The Eighth Circuit suggested that Congress intended to waive the failure on the part of the members of the putative class to exhaust their administrative remedies or seek judicial review in timely fashion (87-827 Pet. App. 15a-17a). But, while Congress did in fact waive the deadlines in the case of claimants who had been denied benefits prior to the 1978 amendments by ordering that their claims be reopened, those claims were reopened and reconsidered. The court of appeals plainly erred in concluding that it could order further reopening. Nothing in the statute suggests that Congress intended to abolish the deadlines it had established, so that claims are permanently subject to reopening by the courts.

In addition, the interests res judicata serves in "avoiding the cost and vexation of repetitive litigation" (*University of Tennessee,* slip op. 9) especially support its application here. The costs of reopening thousands of claims would be significant. Since the claims of putative class members were denied at least three years ago, and many of them long before that, it would be difficult to retrieve their files and locate members of the putative class. In addition, members of Congress and the Department of Labor viewed the backlog in adjudicating black lung benefits claims as unacceptable when pending claims numbered about 21,000 before administrative law judges and 5,687 before the Benefits Review Board. *1985 Hearing, 10 (statement of Sen. Rockefeller); 34 (statement of Rep. Rahall); 126-127 (Statement of Nahum Litt, Chief of the Department of Labor's Office of Administrative Law Judges). The result of this backlog was a delay of three and one-half to seven years for claimants to receive decisions on their claims (id.* at 10 (statement of Sen. Rockefeller)). It takes little imagination to perceive the drastic impact of the Eighth Circuit's decision, which could require the reexamination of 94,000 claims. Cf. *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs,* 461 U.S. 624, 636-637 (1983) (interpreting Longshore and Harbor Workers' Compensation Act to permit significant increase in number of the challenges in administrative process would undermine the statutory goal of providing prompt compensation to injured workers and their survivors.[29]

---

[29] It would also be difficult for individual coal mine operators or the industry-financed Black Lung Disability Trust Fund, which at the end of February 1988 was over $2.9 billion in debt to the United States Treasury, to gather evidence to meet these stale claims. The individual operators and their insurers could not reasonably have anticipated that thousands of previously-denied claims would be ordered reopened. Nor could Congress, in setting the rate of tax on coal to finance the debt-ridden trust fund (26 U.S.C. 4121(a), 9501), have anticipated the Eighth Circuit's decision.

The putative class members are not situated differently from the respondents in *Federated Department Stores* in any significant manner. In that case, several parties filed actions in federal district court, which were all dismissed. Some of the parties appealed, while others did not. While the appealed cases were pending, an intervening decision made clear that the district court had erroneously dismissed the actions and the appealed cases were accordingly remanded. The nonappealing parties then refiled essentially identical actions in order to obtain the benefit of the intervening decision, but this Court held that res judicata barred their claims. The putative class members, like the respondents in *Federated Department Stores,* failed to appeal earlier adjudications and this suit is their attempt to obtain the benefit of the favorable intervening decisions of the courts of appeals other than the Seventh Circuit. Like the nonappealing parties in *Federated Department Stores,* their attempt should be barred by res judicata.[30]

---

[30] The Eighth Circuit cited (87-827 Pet. App. 16a) *Bowen* v. *City of New York*, 476 U.S. 467 (1986), in support of its conclusion that reopening is not barred because the claims had been finally denied. That case does not support the Eighth Circuit's decision to order reopening. First, the time limits under the Black Lung Benefits Act have been construed to be jurisdictional and do not allow for extensions of time as does the provision of the Social Security Act (42 U.S.C. 405(g)) at issue in *Bowen* v. *City of New York*. See 33 U.S.C. 921(c) (incorporated by 30 U.S.C. (& Supp. III) 932(a)). Second, this Court's reasoning in that case supports the conclusion that reopening is *not* appropriate here. The Court recognized that "exhaustion is the rule in the vast majority of cases" (*id.* at 486). It concluded that tolling of statutes of limitations is warranted "in the rare case such as this" (476 U.S. at 481) where an "unrevealed policy" was implemented (*id.* at 485). There was, of course, no secret policy here; the Secretary's interim regulations have been published in the Code of Federal Regulations since they were promulgated in 1978.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

MAY 1988

APPENDIX

A. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that –
>
> (A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;
>
> (B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;
>
> (C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of title 42; and
>
> (D) the Secretary of Labor, in consultation with the Director of the National Institute for

Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of –

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

B. HEW's interim regulation, 20 C.F.R. 410.490, provides:

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

C. Labor's interim regulation, 20 C.F.R. 727.203, provides:

Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412 (a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-057/60451